vested in him—the death of the adoptive parent—he was no longer the child of his first adoptive parents.

The question seems never to have been directly passed on as to whether the court has the power to decree a second adoption when there is nothing in the statute which provides for readoption. In the principal case it was implied that the court must have this power, or else great hardship would be worked in many cases. Under the rule of strict construction which has been adopted by so many of the courts, it seems that the exercise of such power is extremely questionable unless authorized by statutory provision.[22]

WHETHER THE PERFORMANCE OF A PRE-EXISTING CONTRACTUAL DUTY CONSTITUTES SUFFICIENT CONSIDERATION FOR A NEW PROMISE.—Whether the performance of, or the promise to perform, a pre-existing contractual duty or obligation constitutes a sufficient consideration for a new promise is a perplexing question on which the courts are in irreconcilable conflict and which has called forth many learned articles by illustrious legal writers.[1]

The most generally accepted definition of consideration is "any detriment to the plaintiff suffered at the instance of the defendant, and on the faith of the defendant's promise." A somewhat broader definition is "any act or forbearance or promise, by one person given in exchange for the promise of another."[2] In its most common acceptation "detriment" does not include an act, forbearance, or promise already due from the promisee by reason of some pre-existing contractual obligation. But under another view "detriment" is any act, forbearance, or promise on the part of the promisee which involves a change of position on his part.[3]

I. WHEN PUBLIC POLICY INTERVENES.

When the pre-existing contractual obligation consists of some special duty to the public, the law will not sanction a second contract based upon the consideration that the promisee perform this duty. The most striking instances of this kind of contract are the cases of seamen. In *Harris* v. *Watson*,[4] the court held that a seaman could not recover additional compensation promised him by the master of the ship, after the desertion of some of the crew,

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[22] Va. Code, § 2614a, expressly provides for the vacation of the decree of adoption, if in the discretion of the court it is for the best interest of the child, and the restoration of the parties to their former status. There is no provision in regard to readoption.

[1] The Doctrine of Consideration in Bilateral Contracts, Clarence D. Ashley, 3 VA. LAW REV. 201; The Source of Consideration in Bilateral Contracts, Henry Winthrop Ballantine, 3 VA. LAW REV. 432; Two Theories of Consideration, James Barr Ames, 12 HARV. LAW REV. 515; 13 HARV. LAW REV. 29; Consideration in Bilateral Contracts, Samuel Williston, 27 HARV. LAW REV. 503.

[2] 12 HARV. LAW REV. 515.

[3] 12 HARV. LAW REV. 517.

[4] 1 Peake 102.

in consideration of his performing the duties that he was already under a contractual obligation to perform. The decision was based on the ground of public policy. In a similar case, a seaman was denied recovery, not however on the ground that the contract was void because contrary to public policy, but on the ground that there was no consideration for the promise.[5] In *Bartlett* v. *Wyman,*[6] the court rested its decision on the grounds that the contract was contrary to public policy, and also that it was void for lack of consideration. The same rule has repeatedly been applied in the case of public officials who owe the public the duty of rendering their services without extra compensation.[7] And in these cases where public policy intervenes, it makes no difference whether the supposed consideration is the performance of the pre-existing obligation, or the promise to perform it.[8]

II. Where Public Policy Does Not Intervene.

A. Where the promise to perform, or performance of, a pre-existing contractual obligation is to the promisor himself.

Undeniably, the weight of authority is that such a promise or performance is not a sufficient consideration for the new promise. The development of this doctrine seems to have been greatly influenced by the old rule that part payment of a liquidated debt is not sufficient consideration for the promise to accept such sum in satisfaction of the entire debt. This rule, first announced in *Pennel's Case,*[9] was dictum in that case. The payment of the smaller sum was made before maturity, and all the authorities agree that such premature payment constitutes a sufficient consideration for the new promise. Furthermore, the case was decided upon an error in the defendant's pleadings and not on its merits. "The rule is commonly thought to be a corollary of the doctrine of consideration. But this is a total misconception. The rule is older than the doctrine of consideration." [10] Its origin was that in the minds of the old judges, a part payment, though accepted as complete satisfaction, could not be payment of the whole—a simple question of arithmetic. In *Fitch* v. *Sutton,*[11] the court, unaware of the true origin of this rule as to part payments in complete satisfaction of the whole debt, expressed the view that it was based on the doctrine of consideration. And by the decision in *Foakes* v. *Beer,*[12] this rule became the established law of England, and has been generally adopted by the courts of this country.[13] However, the

[5] Stilk *v.* Myrrick, 2 Camp. 317.
[6] 14 Johns. (N. Y.) 260.
[7] England *v.* Davidson, 11 A. & E. 856.
[8] Ashley, Law of Contracts, p. 95. It should be noted that this class of cases does not support the rule that doing or promising to do what one is legally bound to do is no consideration for a new promise. In these cases it is a question of public policy, not of consideration.
[9] 5 Coke 117a.
[10] 12 Harv. Law Rev. 521.
[11] 5 East 230.
[12] 9 App. Cas. 605.
[13] Jones *v.* Perkins, 29 Miss. 139, 64 Am. Dec. 136, and note; Fuller *v.* Kemp, 138 N. Y. 231, 20 L. R. A. 785, and note

many exceptions that are made virtually swallow up the rule.[14]

The rule has been denounced as "being highly technical in character, seemingly unjust, and often oppressive in its operation." [15] It has been abolished in many states by statute,[16] and in others the courts have repudiated it without legislative enactment.[17] The late Dean Ames of the Harvard Law School criticises it as follows:[18]

> "If the parties to a contract see fit for any reason satisfactory to themselves to make a new bilateral agreement whereby one of the parties promises to perform his previous contract, it is difficult to see any objection to this genuine bargain on the scope of consideration. The new promise is an act, and rendered by one who was entirely free to withhold it."

Despite this, it is almost universally accepted that such an agreement will not operate to bar the old debt, since it is said to be accord without satisfaction.[19]

The rules which apply to an agreement to receive part payment in complete discharge of the whole debt should also apply where the new promise is given in consideration of the performance, or promise of performance, of any other pre-existing contractual duty. Such cases arise where, after the making of a bilateral contract by which A is to do a certain act and B to pay a certain price therefor, A, finding his bargain a hard and losing one, threatens to abandon the contract, whereupon B promises him additional compensation to induce him to continue, and on the strength of this promise A performs or promises to perform, but after performance B refuses to pay the additional sum on the ground that there is no consideration. The courts are divided on the question of whether this is a good defense. The majority, perhaps, hold that the second promise is without consideration and the contract void, on the ground that doing what one is legally bound by contract to do is no consideration for another undertaking.[20]

There is almost an equal number of cases holding that the new promise is supported by sufficient consideration.[21] It has some-

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[14] Brooks *v.* White, 2 Metc. (Mass.) 283, 27 Am. Dec. 95; Varney *v.* Conery, 12 Me. 527. See CLARK, CONTRACTS, 2 ed., p. 161 *et seq.*, for an enumeration of the many exceptions.

[15] Seymour *v.* Goodrich, 80 Va. 303.

[16] See Va. Code, § 2858.

[17] Clayton *v.* Clark, 74 Miss. 499, 21 South. 565, 60 Am. St. Rep. 521; Frye *v.* Hubbell, 74 N. H. 358, 68 Atl. 325; Dreyfus *v.* Roberts, 75 Ark. 354, 87 S. W. 641, 69 L. R. A. 823, 112 Am. St. Rep. 67; Brown *v.* Kern, 21 Wash. 211, 57 Pac. 798.

[18] 13 HARV. LAW REV. 37.

[19] Clifton *v.* Litchfield, 106 Mass. 34.

[20] Lingenfelder *v.* Wainwright, 103 Mo. 578, 15 S. W. 844; Reynolds *v.* Nugent, 25 Ind. 328; Elbin *v.* Miller's Ex'r, 78 Ky. 371. See note, 34 L. R. A. 1.

[21] Bishop *v.* Busse, 69 Ill. 403; Monroe *v.* Perkins, 9 Pick. (Mass.) 298, 20 Am. Dec. 475; Holmes *v.* Doane, 9 Cush. (Mass.) 135; Rollins *v.* Marsh, 128 Mass. 116; Rogers *v.* Rogers, 139 Mass. 440, 1 N. E. 122;

times been said that a sufficient consideration is afforded by the fact that the plaintiff by entering into the new agreement gives up his right to have a jury determine the amount of damages for the breach of his original contract, but this reason does not seem proper, as it would encourage parties to break contracts. Some of the cases have based their decisions on the ground that the parties waived their rights under the old contract.[22] But since a contract cannot be avoided by a "waiver," this reason seems wrong. What these courts probably intended was that the parties rescinded their original contract, for this is the proper way to avoid the old contract and render the new one binding. Certainly the parties may mutually agree to give up an existing contract and make a new one. Whether they have done so is a question of fact. If the consideration for the new promise be the performance or promise of performance of the old contract, what the parties really intend is a rescission of the old contract and the substitution of a new one in its place. It is difficult to see why the mutual promises of the parties to substitute a new contract for the old is not a sufficient consideration.

B. When the promise to perform the pre-existing contractual duty is to a person other than the original promisor.

The only judicial intimation found of a distinction between a promise to a third person to perform a pre-existing contractual obligation and the performance of it is in *Merrick* v. *Gidding,*[23] where it is discussed *obiter.* The rule there laid down is that performance does not render the contract binding by furnishing consideration, but that a promise to perform does constitute consideration. In *Scotson* v. *Pegg,*[24] a leading English case, where there was such a promise of performance, it was held that there was a sufficient consideration to render the contract binding. Where the parties so promise there is necessarily an assent to a new agreement, and while it is the duty of the party to keep his prior contract, yet he is under no obligation to enter into an agreement with a third person to do so.[25] In bilateral contracts the consideration is the promise and not the legal obligation of each party.

C. Where the performance of a pre-existing contractual duty is to a person other than the original promisor.

In 1616, in *Bagge* v. *Slade,*[26] the rule was first announced that

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Connelly *v.* Devoe, 37 Conn. 570; Goebell *v.* Linn, 47 Mich. 489, 11 N. W. 284; Lawrence *v.* Davey, 28 Vt. 264; Foley *v.* Storrie, 4 Tex. Civ. App. 377, 23 S. W. 442. The cases of Havana Press-Drill Co. *v.* Ashurst, 148 Ill. 115, 35 N. E. 873, and Widiman *v.* Brown, 83 Mich. 241, 47 N. W. 231, do not overrule former decisions. They are distinguishable.

[22] Monroe *v.* Perkins, *supra;* Foley *v.* Storrie, *supra.*

[23] 1 Mack (Fed.) 394.

[24] 6 H. & N. 295. This case has been considered by many a case of a unilateral contract, but it rather seems to have been a case of a bilateral contract.

[25] Notes on Consideration, Joseph H. Beale, 17 HARV. LAW REV. 71, 80.

[26] 3 Bulst. 162.

where the consideration for a promise was the performance of a prior contractual obligation with a third person, there was sufficient consideration and an action would lie for the breach of the new contract. The leading case on this point is *Shadwell* v. *Shadwell.*[27] In this case an uncle promised his nephew an allowance upon the latter's marriage to a girl to whom he had previously become engaged. The parties were married, and the nephew sought to hold his uncle to his promise. The court held that the uncle was bound, the consideration for the promise being, (1) the detriment to the plaintiff sustained on the faith of the defendant's promise, as the plaintiff might have been induced to marry on the strength of the defendant's promise, thus relinquishing his right to persuade the object of his affections to postpone the marriage or break of the engagement, and (2) a benefit derived by the uncle because of the near relationship of the parties. In this country a large majority of the cases hold contrary to the English view,[28] although it has some support.[29] But in most of the American cases, the great English cases are not discussed at all.

In New York, where the majority American view has long obtained, in a recent case the court overrules to a certain extent the former doctrine. In *De Cicco* v. *Schweizer* (N. Y.), 117 N. E. 807, the defendant's daughter was engaged to marry G. A short time before the marriage the defendant made a contract with G, which provided that the defendant, in consideration of the marriage being consummated, would pay a certain sum to his daughter annually. The marriage followed and for ten years the defendant continued to pay the annual instalments. The plaintiff held an assignment of the contract, and on the defendant's default in the payment of an instalment, he brought an action on the contract. The defendant contended that there was no consideration for the contract, because G was already engaged to the defendant's daughter and was under a legal duty to marry her. The court held there was consideration and that the defendant was liable.

The contract was clearly unilateral, for the consideration exacted was not a promise, but an act—the marriage. Until then the defendant was not bound on his promise. The court distinguished this case from the prior New York cases, on the ground that, in legal effect, the promise was made not to G alone, but to them both jointly, to persuade them not to break the contract that they were free to abandon. The court presumed that the daughter knew of the promise and acted upon the strength of it, although there was no evidence tending to show that this was true. And it is difficult to see how the fact that the promise was made to both parties would make any difference. The decision seems sound, but the court put a strained construction on the facts in order to

[27] 9 C. B. n. s. 159.

[28] Ford *v.* Garner, 15 Ind. 298; Schuler *v.* Myton, 48 Kan. 282, 29 Pac. 163; Vanderbilt *v.* Schreyer, 91 N. Y. 392; Davenport *v.* Congregational Society, 33 Wis. 387.

[29] Green *v.* Kelly, 64 Vt. 309; Holmes *v.* Doane, *supra.*

reconcile the case with its prior decisions. The case seems to be analogous to *Shadwell* v. *Shadwell*,[30] the leading English case, and it seems that the court should have come out and placed the decision on the ground upon which that decision rests.

An examination of the authorities leads to the conclusion that the strict doctrine of consideration is not, and cannot be, applied consistently under all circumstances, and the broader rule which encourages, rather than hampers, freedom of contract should be adopted as far as possible.

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[30] *Supra.*